

Message Text

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FM SECSTATE WASHDC

TO AMCONSUL RIO DE JANEIRO IMMEDIATE

C O N F I D E N T I A L STATE 233885

PASS TO RIO FOR KRATZER AND SEAMANS

E.O. 11652: GDS

TAGS: TECH, ENRG,

SUBJECT: STATUS OF NUCLEAR EXPORT LEGISLATION

REF: BENGELSDORF-KRATZER TELCON OF SEPTEMBER 19, 1976

1. FOLLOWING IS TEXT OF LETTER DATED SEPTEMBER 17, 1976
FROM SENATORS RIBICOFF, PERCY, GLENN AND JAVITS TO THE
PRESIDENT ON THE QUESTION OF NUCLEAR EXPORT LEGISLATION.
DOCUMENTS ENTITLED "MAJOR DIFFERENCES BETWEEN COMPROMISE
SUBSTITUTE AND JOINT COMMITTEE BILLS" WAS ENCLOSED WITH
COVER LETTER.
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2. BEGIN TEXT OF LETTER. DEAR MR. PRESIDENT: AS YOU
KNOW, MAJOR LEGISLATION IS AWAITING SENATE ACTION ON THE
CRITICAL PROBLEM OF NUCLEAR PROLIFERATION. THIS LEGISLA-
TION IS THE PRODUCT OF NEARLY TWO YEARS OF WORK BY THE

GOVERNMENT OPERATIONS COMMITTEE, WHICH HELD EXTENSIVE HEARINGS AND RECEIVED 4,500 PAGES OF TESTIMONY AND BACKGROUND MATERIAL FROM ADMINISTRATION, INDUSTRY, AND OTHER EXPERT WITNESSES. SUBSEQUENT EXTENSIVE DISCUSSIONS AMONG THE MEMBERS AND STAFF OF THE GOVERNMENT OPERATIONS, FOREIGN RELATIONS, AND JOINT ATOMIC ENERGY COMMITTEES PRODUCED A COMPROMISE PROPOSAL WHICH WAS INTRODUCED BY SENATOR PASTORE, CO-SPONSORED BY KEY MEMBERS OF ALL THREE

COMMITTEES, AND APPROVED OVERWHELMINGLY BY THE FOREIGN RELATIONS COMMITTEE. THAT COMPROMISE WILL BE OFFERED AS SUBSTITUTE LANGUAGE FOR S. 1439, WHICH HAS BEEN ON THE SENATE CALENDAR FOR SEVERAL WEEKS.

IN A SEPARATE ACTION, THE JOINT COMMITTEE ON ATOMIC ENERGY HAS REPORTED OUT A BILL ORIGINATING IN THE HOUSE. IT IS OUR DEEP CONVICTION THAT SEVERAL PROVISIONS OF THAT LEGISLATION ARE UNACCEPTABLE. THE BILL IS NOT ONLY SUBSTANTIALLY WEAKER THAN THE COMPROMISE PROPOSAL; IT WOULD SERIOUSLY UNDERMINE EXISTING UNITED STATES EXPORT CONTROL PROCEDURES AND CONDONE DANGEROUS PRACTICES WHICH HAVE ALREADY HEIGHTENED THE RISK OF NUCLEAR PROLIFERATION. A MEMORANDUM IS ENCLOSED OUTLINING OUR PRINCIPAL OBJECTIONS TO THE PROVISIONS OF H.R. 15419, AS AMENDED.

THE UNITED STATES CAN AND MUST EXERT STRONG AND CREATIVE LEADERSHIP IN THE EFFORT TO HALT NUCLEAR PROLIFERATION. WE URGE YOU TO PURSUE EVERY AVENUE TO CONVEY THE URGENCY OF THIS PROBLEM TO THE WORLD COMMUNITY, INCLUDING A MAJOR PRESIDENTIAL ADDRESS ON PROLIFERATION BEFORE THE UNITED NATIONS OR SOME OTHER SUITABLE FORUM THIS FALL, AND TO ASSIST US IN EVERY WAY POSSIBLE TO ENACT A STRONG, CONSTRUCTIVE NON-PROLIFERATION BILL IN THIS CONGRESS.

SPECIFICALLY, WE RESPECTFULLY REQUEST THAT THE "HOLD" PLACED ON S. 1439 AT THE REQUEST OF THE ADMINISTRATION BE CONFIDENTIAL

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REMOVED SO THAT EARLY NEXT WEEK THE SENATE CAN CONSIDER THIS LEGISLATION UNDER A REASONABLE TIME LIMITATION AGREEMENT ALLOWING FOR ADEQUATE DEBATE. AFTER APPROVAL BY THE SENATE, THE HOUSE MAY ENACT WHATEVER IT DEEMS APPROPRIATE, PERMITTING US IN CONFERENCE TO REACH COMPROMISE ON THE FINAL PROVISIONS OF A BILL THAT WILL OFFER HOPE THAT WE CAN ACHIEVE A MORE EFFECTIVE INTERNATIONAL AGREEMENT PLACING STRICT CONTROLS ON THE TRANSFER AND USE OF SENSITIVE NUCLEAR MATERIAL AND TECHNOLOGY. EVEN IF THE HOUSE, BECAUSE OF APPROACHING SINE DIE ADJOURNMENT, CANNOT ACT, WE FEEL THAT PASSAGE OF A STRONG AND RESPONSIBLE SENATE BILL WOULD LEND CREDIBILITY TO THE ADMINISTRATIONS EFFORTS TO REACH AGREEMENT AT THE NUCLEAR SUPPLIERS' CONFERENCE AND TO STRENGTHEN THE SAFEGUARDS OF THE INTERNATIONAL

ATOMIC ENERGY AGENCY.

2. BEGIN TEXT OF ENCLOSURE. MAJOR DIFFERENCES BETWEEN COMPROMISE SUBSTITUTE AND JOINT COMMITTEE BILLS: CHANGES MADE AT THE JOINT COMMITTEE MARKUP, MOSTLY AT THE SPECIFIC REQUEST OF ERDA, SERIOUSLY WEAKEN THE ORIGINAL COMPROMISE-

SUBSTITUTE BILL, AND IN CERTAIN INSTANCES ARE RETROGRESSIVE---THAT IS, WOULD RESULT IN A WEAKER NON-PROLIFERATION SYSTEM THAN EXISTS UNDER CURRENT LAW.

FOLLOWING ARE THE MAJOR DIFFERENCES BETWEEN THE COMPROMISE-SUBSTITUTE (FOREIGN RELATIONS) BILL AND THE JOINT COMMITTEE BILL:

1. INDEPENDENCE OF NRC

THE JOINT COMMITTEE BILL GIVES THE PRESIDENT AN ABSOLUTE VETO OVER EXPORT LICENSING DECISIONS OF THE NUCLEAR REGULATORY COMMISSION. IN THE EVENT THAT THE NRC FINDS THAT ISSUANCE OF A PROPOSED EXPORT LICENSE WOULD BE INIMICAL TO THE COMMON DEFENSE AND SECURITY, (BECAUSE THE RECIPIENT COUNTRY DOES NOT ADHERE TO ONE OR MORE OF SIX "PRINCIPLES" GOVERNING U.S. NUCLEAR EXPORTS), THE PRESIDENT CAN IMMEDIATELY OVERTURN THE COMMISSION'S DECISIONS IF HE FINDS THAT WITHHOLDING THE LICENSE WOULD SERIOUSLY PREJUDICE U.S. NON-PROLIFERATION OBJECTIVES OR CONFIDENTIAL

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OTHERWISE JEOPARDIZE COMMON DEFENSE AND SECURITY.

UNDER THE COMPROMISE-SUBSTITUTE BILL, THE PRESIDENT IS GIVEN LESS LATITUDE IN OVERTURNING NRC EXPORT LICENSING DECISIONS. HE CAN, BY EXECUTIVE ORDER, MODIFY FOUR OF SIX EXPORT "CRITERIA" ON A CASE-BY-CASE BASIS BUT ONLY IF HE FINDS THAT SUCH EXCEPTIONS ARE IN THE NATIONAL INTEREST, WILL NOT PROMOTE THE ACQUISITION OF NUCLEAR EXPLOSIVES AND HE HAS RECEIVED A NO-EXPLOSION PLEDGE FROM THE RECIPIENT COUNTRY TO WHICH THE EXCEPTION APPLIES. HE IS BARRED FROM OVERTURNING CRITERIA REQUIRING RECIPIENT COUNTRIES TO ACCEPT IAEA SAFEGUARDS AND TO TAKE A NO-EXPLOSION PLEDGE WITH RESPECT TO U.S. EXPORTS. HIS ORDER OVERTURNING OTHER CRITERIA CANNOT TAKE EFFECT FOR 60 DAYS, THUS ALLOWING CONGRESS TIME TO PASS A LAW OVERRULING HIM, IF IT SEES FIT.

THE JOINT COMMITTEE VERSION, BY GIVING THE PRESIDENT AN IMMEDIATE AND ABSOLUTE VETO OVER THE NRC, WOULD DESTROY THE INDEPENDENT CHECK THAT THE NRC--AND BEFORE IT THE AEC--HAS ALWAYS HAD ON EXECUTIVE BRANCH NUCLEAR EXPORT ACTIVITIES. NO LONGER WOULD THE NRC BE FREE TO EXERCISE THE STATUTORY VETO--TO INSURE THAT EXPORTS ARE NOT "INIMICAL TO THE

COMMON DEFENSE AND SECURITY"--AS PROVIDED IN THE ATOMIC ENERGY ACT OF 1954. THE EFFECT WOULD BE A DE FACTO REPEAL OF THE ENERGY REORGANIZATION ACT OF 1974 AND A RESTORATION OF THE "RUBBERSTAMP" EXPORT LICENSING FUNCTION OF THE OLD AEC REGULATORY DIVISION.

2. PLUTONIUM REPROCESSING

THE JOINT COMMITTEE BILL TAKES A SOFTER STANCE ON PLUTONIUM REPROCESSING THAN TAKEN IN THE COMPROMISE SUBSTITUTE BILL.

THE JCAE BILL, IN BOTH THE PHASE I "PRINCIPLES" AND THE STRICTER PHASE II "CRITERIA" GOVERNING U.S. NUCLEAR EXPORTS, WOULD PERMIT RECIPIENT COUNTRIES TO REPROCESS PLUTONIUM ON A NATIONAL BASIS UNDER CERTAIN CIRCUMSTANCES. SPECIFICALLY, SUCH REPROCESSING COULD TAKE PLACE UNDER CONDITIONS THAT WOULD "MINIMIZE" THE LIKELIHOOD OF DIVERSION AND IF THE REPROCESSING PLANT IS USED TO SERVICE OTHER NATIONS.
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THE PHASE I CRITERIA OF THE COMPROMISE SUBSTITUTE WOULD REQUIRE PRIOR APPROVAL BY THE UNITED STATES OF ANY PLUTONIUM REPROCESSING IN CONNECTION WITH A U.S. EXPORT, WITHOUT EXCEPTION. THE STRICTER PHASE II CRITERIA WOULD BAR NON-NUCLEAR WEAPONS STATES FROM BUILDING PLUTONIUM REPROCESSING OR URANIUM ENRICHMENT PLANTS, ALTHOUGH SUCH COUNTRIES (INCLUDING GERMANY AND JAPAN) HAVING THESE PLANTS BY THE TIME THE CRITERIA TAKE EFFECT COULD OPERATE THEM UNDER EFFECTIVE INTERNATIONAL MANAGEMENT AND CONTROL.

THE JCAE BILL CONTAINS LOOPHOLES THAT WOULD PERMIT NATIONAL REPROCESSING OF PLUTONIUM DERIVED FROM IMPORTED HEAVY WATER (THE INDIA EXAMPLE) AND WOULD NOT REQUIRE REPROCESSING OF IMPORTED REACTOR FUEL OUTSIDE THE BORDERS OF THE RECIPIENT COUNTRIES (THUS LESS STRICT THAN THE PROPOSED ISRAELI AND EGYPTIAN AGREEMENTS). THESE LOOPHOLES, PLUS THE EXCEPTIONS CITED ABOVE, CAN ONLY SERVE TO PROMOTE DEVELOPMENT OF WEAPONS-SENSITIVE REPROCESSING AND ENRICHMENT PLANTS, ESPECIALLY IN MUTUALLY ANTAGONISTIC NATIONS. THE SPREAD OF NUCLEAR-WEAPONS MATERIAL AND CAPABILITY WOULD BE ACCELERATED UNDER THE JCAE BILL.

3. STRICT CRITERIA

THE JCAE BILL DELAYS IMPLEMENTATION OF THE STRICTER PHASE II CRITERIA WITH RESPECT TO U.S. EXPORTS UNTIL ALL THE SUPPLIER NATIONS AGREE TO ALL OF THE CRITERIA. EVEN THEN, THE CRITERIA WOULD NOT TAKE EFFECT IMMEDIATELY; RATHER, THE PRESIDENT WOULD HAVE TO SUBMIT LEGISLATION REFLECTING THE PRECISE DETAILS OF THE SUPPLIERS AGREEMENT.

THE COMPROMISE SUBSTITUTE REQUIRES IMPLEMENTATION OF THE

PHASE II CRITERIA 18 MONTHS AFTER ENACTMENT, ALTHOUGH THE PRESIDENT HAS FULL DISCRETION TO DELAY THE EFFECTIVE DATE OF SOME OR ALL OF THE CRITERIA INDEFINITELY, BY 12-MONTH

INCREMENTS, IF HE DETERMINES THAT IMMEDIATE IMPLEMENTATION WOULD HAVE A SERIOUS ADVERSE EFFECT ON VITAL U.S. INTERESTS AND THAT THE DELAY WILL NOT PROMOTE THE ACQUISITION OF NUCLEAR EXPLOSIVES BY RECIPIENT COUNTRIES.

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THE MECHANISM IN THE COMPROMISE SUBSTITUTE IS DESIGNED TO PERMIT THE PRESIDENT MORE TIME TO NEGOTIATE ADHERENCE TO THE CRITERIA BY THE OTHER SUPPLIER NATIONS, AND AT THE SAME TIME, TO PUT PRESSURE ON BOTH THE PRESIDENT AND THE SUPPLIERS TO REACH SUCH AN AGREEMENT. THE JCAE MECHANISM APPLIES TO SUCH PRESSURE, AND, IN FACT, WOULD ENCOURAGE DILATORY ACTION BY THE SUPPLIERS BECAUSE THE CRITERIA CANNOT TAKE EFFECT UNTIL ALL OF THEM SIGN ON. THERE ARE NO "TEETH" IN THE JCAE MECHANISM, AND THE END RESULT WOULD BE HORTATORY RATHER THAN MANDATORY CRITERIA.

4. ARMS CONTROL AND DISARMAMENT AGENCY

THE JCAE BILL ELMINATES THE REQUIREMENT IN THE COMPROMISE-SUBSTITUTE FOR NUCLEAR PROLIFERATION ASSESSMENT STATEMENTS BY ACDA WITH RESPECT TO SIGNIFICANT NUCLEAR EXPORTS AND AGREEMENTS. THESE STATEMENTS WOULD SERVE TO ENHANCE ACDA'S ROLE AS AN ARMS-CONTROL ADVISOR AND CHECK WITHIN THE EXECUTIVE BRANCH IN THE NUCLEAR PROLIFERATION AREA. THE COMPROMISE-SUBSTITUTE BARS JUDICIAL REVIEW REGARDING THE PERFORMANCE OR THE ADEQUACY OF THE PROLIFERATION ASSESSMENT STATEMENTS SO THAT THEY CANNOT BECOME A NEPA-LIKE TOOL FOR DELAY BY INTERVENORS IN LICENSING PROCEEDINGS. THUS, THE ACDA STATEMENTS SHOULD BE RETAINED AS AN IMPORTANT CHECK ON THE PROLIFERATION ASPECTS OF NUCLEAR EXPORTS.

5. GOVERNMENT TO GOVERNMENT EXPORTS

THE JCAE BILL WOULD EFFECTIVELY RESTORE THE AUTHORITY OF THE PRESIDENT TO APPROVE NUCLEAR EXPORTS ON A GOVERNMENT-TO-GOVERNMENT BASIS. THE COMPROMISE-SUBSTITUTE REQUIRES ALL BUT INSIGNIFICANT GOVERNMENT-TO-GOVERNMENT EXPORTS TO BE LICENSED BY THE NRC. THIS WAS DONE BECAUSE THE GOVERNMENT-TO-GOVERNMENT PROCEDURE HAS BEEN USED TO SECRETLY TRANSFER SUBSTANTIAL QUANTITIES OF PLUTONIUM, WEAPONS-GRADE URANIUM AND HEAVY WATER TO OTHER NATIONS. SUCH ACTIVITIES HAVE ACCELERATED THE SPREAD OF WEAPONS CAPABILITIES, AND THEY SHOULD BE BROUGHT UNDER NRC'S LICENSING AND REVIEW PROCEDURES.

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6. COMPONENTS AND SUBSTANCES

THE JCAE HAS ELIMINATED PROVISIONS IN THE COMPROMISE-SUBSTITUTE THAT WOULD GIVE THE NRC LICENSING AUTHORITY OVER NON-NUCLEAR COMPONENTS AND SUBSTANCES WHEN THEY ARE TO BE EXPORTED FOR SIGNIFICANT USE IN NUCLEAR FACILITIES. SUCH COMPONENTS INCLUDE HEAVY WATER (THE INDIA EXAMPLE), COMPUTERS (THE SOUTH AFRICA EXAMPLE) AND SUCH ITEMS COMMONLY USED IN REPROCESSING PLANTS AS LEADED GLASS AND REMOTE-CONTROL HANDLERS. THE NRC DOES NOT HAVE JURISDICTION TO LICENSE THESE ITEMS NOW WHEN THEY ARE DESTINED FOR USE IN NUCLEAR FACILITIES. THIS IS A SERIOUS LOOPHOLE, AND IT SHOULD BE CLOSED.

7. RENEGOTIATION OF NUCLEAR AGREEMENTS

THE JCAE BILL ELIMINATES A REQUIREMENT IN THE COMPROMISE-SUBSTITUTE FOR THE PRESIDENT TO REPORT ANNUALLY AS TO WHICH AGREEMENTS FOR COOPERATION REQUIRE MODIFICATION THROUGH RENEGOTIATION BECAUSE OF SUCH ACTIVITIES IN A RECIPIENT COUNTRY AS SETTING OFF A NUCLEAR EXPLOSION, REFUSAL TO ACCEPT IAEA SAFEGUARDS AND TO TAKE A NO-EXPLOSIVE PLEDGE WITH RESPECT TO ALL NUCLEAR ACTIVITIES. IT SHOULD BE NOTED THAT THE PRESIDENT IS NOT REQUIRED TO RENEGOTIATE THE AGREEMENTS, ONLY TO REPORT AS TO WHICH AGREEMENTS MAY REQUIRE NEGOTIATION BECAUSE OF QUESTIONABLE OR DANGEROUS ACTIVITIES IN RECIPIENT COUNTRIES. THIS PROVISION WILL HELP KEEP CONGRESS INFORMED OF PROLIFERATION ACTIVITIES ON A TIMELY BASIS, AND IN VIEW OF THE INADEQUACY OF PRESENT AGREEMENTS TO PREVENT SUCH ACTIVITIES (AS DISCUSSED IN THE CRS REPORT ON NUCLEAR AGREEMENTS), IT SHOULD BE RETAINED. ROBINSON

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